STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2005
v	No. 249577 Oscoda Circuit Court
DENNIS O'NEILL, SR., Defendant-Appellant.	LC No. 02-000759-FC; 02-000760-FC; 02-000761-FC

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The charges in this case involved defendant sexually assaulting an eleven-year-old victim on a camping trip, during a car trip to her martial arts tournament, and in defendant's home following a martial arts practice. He was sentenced to concurrent terms of 18 to 40 years' imprisonment for each count of CSC I and 6 to 15 years for the CSC II count. We affirm.

Defendant argues that references to prior and subsequent uncharged sexual acts between himself and complainant were improper character evidence inadmissible under MRE 404(b). Defendant also argues that admission of the evidence violated MRE 404(b)(2) because the prosecutor failed to provide notice of his intent to introduce the evidence. Because defendant failed to object to the evidence at trial, this issue is unpreserved and our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The evidence of defendant's other sexual assaults was admissible under the rule in *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). *DerMartzex* provides that "the probative value [of the other-acts evidence] outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id.* Our Supreme Court has explained, "[t]he rationale for the . . . exception was that prior sexual acts between the victim and defendant were a part of the 'principal transaction' necessary for the jury to weigh the victim's testimony about the principal transaction." *People v Jones*, 417 Mich 285, 289-290; 335 NW2d 465 (1983). In its most recent discussion of *DerMartzex*, our Supreme Court noted that "evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony."

People v Sabin (After Remand), 463 Mich 43, 69-70; 614 NW2d 888 (2000). Because the challenged evidence squarely fits within the rationale of *DerMartzex* and *Jones*, the trial court did not commit plain error when it allowed the prosecutor to introduce the evidence.

Defendant argues that the failure of the prosecutor to give notice of his intent to present evidence of defendant's uncharged sexual acts with the victim contravened MRE 404(b)(2) and was plain error affecting defendant's substantial rights. We disagree. The prosecutor presented the challenged testimony at the preliminary examination, so the defense was at least aware that the other evidence existed and that the prosecutor was prepared to provide it. Therefore, defendant has failed to demonstrate how the absence of official notice under MRE 404(b)(2) would have altered the presentation of his defense at trial, and given the strong and corroborated testimony of the victim, we do not see how the error affected his substantial rights. *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

Defendant also argues that the court's failure to give a limiting instruction on the use of the other acts evidence was error. We disagree. Defendant has forfeited this issue because he did not object or request a limiting instruction below, and without some showing of prejudice, the failure to give such a limiting instruction sua sponte does not amount to plain error that affects a defendant's substantial rights. *People v Rice (On Remand)*, 235 Mich App 429, 443; 597 NW2d 843 (1999).

Defendant next argues that the prosecutor improperly vouched for the complainant's credibility and argued facts that were not in evidence. We disagree. Defendant failed to object to the prosecutor's statements at trial, therefore this issue is unpreserved and forfeited. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant forfeited this issue, we will not review it unless it appears that an objection could not have cured the error or unless a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, the prosecutor argued that given the nature of the charges and the embarrassment of trial, the victim simply had no reason to fabricate the charges. The prosecutor also asked the witness directly whether she was lying. The direct questioning of the victim's veracity and closing statements asking the jury to consider her lack of motivation to lie did not imply that the prosecutor had any special knowledge about the victim's truthfulness, so the prosecutor did not impermissibly vouch for the victim. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant also claims that the prosecutor improperly argued facts that were not in evidence by offering alternative explanations why the victim had not bled during intercourse with defendant. We disagree. The prosecutor did not argue a single, unproved explanation for the bloodless intercourse, but rather, argued that any number of ordinary circumstances could explain the phenomenon. These arguments were in response to defendant's claim that intercourse would necessarily draw blood, so the victim must have fabricated her allegations. In context, the prosecutor was calling on the jury to use its common sense, and the trial court could have cured any improper prejudice with a simple instruction. *Stanaway*, *supra*.

Defendant next argues that the court's decision to join the charges was error. We disagree. The denial of a motion to sever related charges is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). In this case, the trial court properly joined the charges under MCR 6.120(B) because this was a case of several episodes of

criminal sexual conduct against one victim in accordance with a single plan or scheme. *People v Miller*, 165 Mich App 32; 418 NW2d 668 (1987).

Defendant next argues that the court's failure to grant his motion for change of venue denied him a fair trial. We disagree. The relevant question is whether pre-trial publicity was so pervasive and prejudicial that the entire jury pool was presumptively exposed to it and the exposure substantially impaired defendant's ability to receive a fair trial from the impaneled jury. *People v Jendrzejewski*, 455 Mich 495; 566 NW2d 530 (1997). Defendant moved for change of venue before trial. Arguments were heard before voir dire, and the court denied the motion but indicated that defendant could raise the motion again after voir dire. At the close of voir dire, defendant did not renew his motion and made no objection to the jury as seated. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000). The record reflects that only five members of the fifty-member jury panel had read anything about the case, and none of them could remember any details about the articles. Only one of those members ended up on the actual jury, and his recollection of the articles was vague. It is also telling that defendant did not use a peremptory challenge to remove that member of the jury. Therefore, the publicity in this case did not impair defendant's ability to receive a fair trial from the impaneled jury. *Jendrzejewski, supra*.

Finally, defendant argues that he received ineffective assistance of counsel. We disagree. Because defendant did not raise the issue in the trial court or seek a *Ginther*[1] hearing, we limit our review of defendant's claims to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id*. at 140, citations omitted.]

Defendant first argues that counsel's failure to renew the motion to change venue, object to other-acts evidence, and object to the prosecutor's questions and comments about the victim's credibility constituted error. However, defendant's motion to change venue lacked evidence of pervasive pre-trial publicity or prejudice, the evidence of defendant's other sexual acts was properly admitted, and the statements by the prosecutor did not amount to impermissible vouching. A defendant will not prevail on a claim of ineffective assistance that is based on trial counsel's failure to enter a meritless objection or motion. *Id.* at 142; *Hawkins*, *supra* at 457.

Defendant next claims that counsel was ineffective for failing to call any witnesses, including defendant or a medical expert. We disagree. Defendant fails to offer any proof that a medical expert would have testified contrary to the victim. Because defendant fails to provide any evidence to the contrary, we must presume that the decision not to call defendant or an

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

expert as a witness was a matter of trial strategy, and we will not second guess it. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant also argues that his trial counsel failed to make any worthwhile arguments in closing. In general, a defense counsel's closing argument, specifically what defense counsel chooses to highlight, is a matter of trial strategy. *In re Rogers*, 160 Mich App 500, 505; 409 NW2d 486 (1987). Defendant's trial counsel cross-examined several witnesses, including the victim, about what they saw, possible bias, and prior inconsistent statements. Defense counsel highlighted these deficiencies and inconsistencies in her closing. She also argued that the witnesses misunderstood defendant's relationship with the victim and that defendant was a victim of small-town gossip. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell